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SUMMARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1963.

No. 497.

ALGOT V. ECKSTROM,

Appellant,

v.

READING POLICE HOME ASSOCIATION OF READING, PA., a corporation,

Appellee.

On Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

CHARLES H. WEIDNER,
607 Washington Street,
Reading, Pennsylvania.
ARTHUR LITTLETON,
2107 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pennsylvania,
Attorneys for Appellant.

Of Counsel:
STEVENS & LEE,
607 Washington Street,
Reading, Pennsylvania.
MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pennsylvania.

International, 711 So. 50th St., Phila. 43, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. .

ALGOT V. ECKSTROM,

Appellant,

v.

READING POLICE HOME ASSOCIATION OF READING, PA., A CORPORATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Pennsylvania which was entered on March 19, 1963, and became final when appellant's timely petition for reargument was denied by the Supreme Court of Pennsylvania on April 18, 1963. The judgment of the Supreme Court of Pennsylvania affirmed a judgment of the Court of Common Pleas of Berks County, Pennsylvania, which court entered judgment in favor of the appellee notwithstanding the verdict in favor of the appellant by the jury. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported in 410 Pa., page 282. The opinion of the Court of Common Pleas is reported in 54 Berks County Law Journal 147. Copies of these opinions and also a copy of the appellant's petition for reargument in the Supreme Court of Pennsylvania [1] are attached hereto in the Appendix.

JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked on appeal under 28 U. S. C. Section 1257(2).

The judgment of the Supreme Court of Pennsylvania was entered on March 19, 1963. Appellant filed a timely petition in that court for a reargument which was denied on April 18, 1963, on which date the judgment of the Supreme Court of Pennsylvania thereupon became final. The notice of appeal was filed in the Court of Common Pleas of Berks County, Pennsylvania, which was the court possessed of the record, on July 16, 1963.

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case: *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921); *Fiske v. Kansas*, 274 U. S. 380, 47 S. Ct. 655, 71 L. Ed. 1108 (1927); *Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri*, 367 U. S. 717, 721, 81 S. Ct. 1708, 1711, 6 L. Ed. 2d 1127, 1130 (1961).

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1. No answer was filed to this petition.

State Statute Involved.

The state statute involved is the Pennsylvania Act of April 22, 1905, P. L. 286, Section 1; Purd. Penna. Stat. Ann., Section 681, at page 347, which reads as follows:

> "Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may within the time prescribed for moving for a new trial, or within such other or future time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

Constitutional Provision Involved.

The constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

Appellant recovered a verdict in an action for personal injuries in Pennsylvania where the Act of 1905, P. L. 286, 12 Purd. Penna. Stat. Ann. § 681, is the sole authority for the exercise by the court of the right to enter judgment non obstante veredicto against the verdict winner. The Supreme Court of Pennsylvania, contrary to its prior practice and interpretation of the Act of 1905, approved the substitution of certain findings of fact not supported by the verdict and the rejection of others sustained by the verdict, and thereupon affirmed the entry of judgment n.o.v. for the defendant on the basis of such redecided facts.

1. Is not said Act of 1905, as so applied in this case, unconstitutional as being in violation of plaintiff's rights under Section 1 of the Fourteenth Amendment of the Constitution of the United States in that said application of the Act deprived the plaintiff of his property without due process of law by depriving him of (a) his verdict and (b) his right to a jury trial in accordance with the accepted and usual course of such judicial proceedings?

2. Was not the entry of judgment n.o.v. for the defendant in the above circumstances likewise in violation of the plaintiff's same constitutional rights?

STATEMENT OF THE CASE.

Nature of the Federal Question Involved.

Appellant was denied due process of law in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States because of the manner in which the lower court deprived him of his verdict and consequently his right to recover damages for serious personal injuries. The court below usurped the power of the jury to find the facts, and appellant had a jury trial in name only. In passing upon and granting appellee's motion for judgment notwithstanding the verdict, the lower court did not accept the findings of fact made by the jury but improperly invaded the function and province of the jury by substituting and adding other facts of its own choosing which gave rise to legal implications adverse to appellant and different from those arising out of the facts supported by and consistent with the jury's verdict.

Trial by jury as at common law is the usual and accepted course of judicial procedure in Pennsylvania to try disputed questions of fact in an action at law. Appellant was entitled to such jury trial under the Pennsylvania constitution which provides: "Trial by jury shall be as heretofore, and the right thereof remain inviolate."[2] This is substantially the same character of jury trial as that guaranteed by the Seventh Amendment to the Constitution of the United States. Both have as their chief attribute the distinction between the exclusive power and function of the jury to determine the facts and the power of the court to declare the law. The pronouncements of this Court in numerous cases which emphasize this distinction are pertinent here.

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2. Art. 1, Sec. 6, of Pennsylvania Constitution—Purd. Penna. Stat. Ann., Constitution, Articles 1-4, p. 115.

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944), this Court said (pp. 412, 413):

> ". . . It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citing cases.) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.
>
> "Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. *Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial.* No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion." (Italics supplied.)

The *Tennant* case was quoted and applied by this Court in the recent case of *Gallick v. Baltimore and Ohio Railroad Company*, 83 S. Ct. 659, 663, 664 (1963).

In *Lavender v. Kurn*, 327 U. S. 645, 652, 653, 66 S. Ct. 740, 743, 744, 90 L. Ed. 916, 922, this Court, in discussing the determination by the jury of a disputed question of fact in favor of the plaintiff, said:

> "Under these circumstances *it would be an undue invasion of the jury's historic function* for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." (Italics supplied.)

The *Lavender* case was quoted in *Basham, Petitioner v. Penna. R. R. Co.*, 83 S. Ct. 965, 10 L. Ed. 2d 80 (April 15, 1963), where this Court said (p. 967):

> "Since, in this case, petitioner's evidence, though disputed, constituted probative facts sufficient to support the finding of negligence, the state courts *improperly invaded the function and province of the jury in setting the verdict aside.* Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493." (Italics supplied.)

The exclusive right of the jury to determine the facts was recognized by the Supreme Court of Pennsylvania in the case of *Dalmas v. Kemble*, 215 Pa. 410, 64 A. 559, which was the first case that discussed the Act of 1905, P. L. 286, after its passage.[3] The right to enter judgment n.o.v. is derived only from the Act of 1905, P. L. 286.[4] Inherent in the application of the statute is the well-settled rule[5] that in

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3. It was said in that case (215 Pa. 411): "This statute makes no radical innovation on the settled line of distinction between the powers of the court and the jury. It shows no intention to infringe, even if it could constitutionally do so, the province of the jury to pass upon the credibility of witnesses and the weight of oral testimony."

It was also said in that case (p. 413): ". . . As already said there is no intent in the act to disturb the settled line of distinction between the provinces of the court and the jury. The act is capable of usefulness in allowing time for mature consideration, but it should not be carried beyond its *legitimate* intent." (Italics supplied.)

4. *King v. Phila. Sub. Trans. Co.*, 160 Pa. Superior Ct. 26, 50 A. 2d 34.

5. In *Brown v. Shirks Motor Express*, 393 Pa. 367, 143 A. 2d 374, the Supreme Court of Pennsylvania said (p. 375): "A jury's verdict is like a building, which is erected from a vast supply of

passing upon a motion for judgment n.o.v. the evidence must be considered in the light most favorable to the verdict winner. This is the same rule that applies in the Federal Courts under Rule 50(b) of the Federal Rules of Civil Procedure.

It is clear therefore that if the court below entered judgment n.o.v. by applying the Act of 1905 to facts not supported by and inconsistent with the verdict, then the appellant has been deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.[6] This is not a case where this Court is asked to examine into the weight of the evidence or the credibility of witnesses. The case is one where the judgment of the lower court is based upon asserted facts which, for the purpose of considering the Federal question here invoked, are actually nonexistent because the jury rejected them. These asserted but actually nonexistent facts will be hereinafter specifically discussed under the heading appearing at page 13 hereof.

Brief Statement of Appellant's Cause of Action and Procedural History.

Considering the evidence in the light most favorable to the appellant, the basic facts found by the jury may be fairly stated as follows: Appellant, a business invitee in appellee's clubrooms, asked the defendant's bartender in charge for directions to the men's room. The bartender motioned to his right and to the rear of himself in the

5. (Continued)
materials, only part of which can satisfy the blueprint of the architect. What is rejected, therefore, has no place in the building, and it can not be forced into the completed structure."

In *Cleavenger v. Zebraskey*, 399 Pa. 380, 160 A. 2d 699, the following pertinent language appears (p. 381): ". . . It would appear, however, that the court below treated the jury's verdict as mere speculation and it proceeded to re-evaluate, re-appraise, and re-decide the facts as if it were a tribunal passing initially on a controverted factual situation, which, of course, it has no right to do."

6. There is no due process clause in the Pennsylvania constitution.

direction of a closed, unmarked, unlocked door which was actually in the opposite direction from the men's room and not in the same area. Appellant opened the door so indicated to him by the bartender. There was no artificial lighting inside the door, but because of the light that shone in from outside the door it appeared to appellant, and he justifiably so believed, that the floor inside the door, for a distance of 3 or 4 feet, was even with the floor outside the doorway. Appellant took one step over the threshold, intending to turn on a light switch, and fell down a flight of unguarded stairs to his serious injury. The first downward step began 8 inches beyond the threshold. Appellant was unfamiliar with the premises and did not see the entrance to the actual men's room at any time prior to his fall. From the point where appellant asked the bartender for directions; the entrance to the men's room was hidden from view by structural recesses and at no time while walking to the door to which he was directed was the entrance to the men's room in his line of vision. Appellant in his complaint alleged negligence on the part of appellee in maintaining the unmarked, unlocked door and in directing him to use that door as the entrance to the men's room.

The jury, under proper instructions, returned a verdict for appellant in the sum of $20,605.50. Appellee filed motions for judgment n.o.v. and a new trial. After argument before the Common Pleas, that court, in an opinion by the trial judge, entered judgment n.o.v. for appellee. No disposition was made of appellee's motion for a new trial. The jury's verdict established that the issues of appellee's negligence and appellant's alleged contributory negligence were decided favorably to appellant.

Appellant appealed to the Supreme Court of Pennsylvania which affirmed the Common Pleas in a per curiam opinion of less than two pages, two Justices dissenting without opinion.

Appellant filed a timely petition[7] for a reargument, referring therein to ample testimony in the record which supports the basic facts essential to appellant's cause of action under the well settled Pennsylvania decisions in clearly apposite cases.

How the Federal Question Is Presented. This Court Has Jurisdiction on Appeal.

The Federal question invoked was raised in appellant's petition for reargument in the Supreme Court of Pennsylvania. This was the first opportunity that appellant had to assert the Federal claim because the Supreme Court of Pennsylvania did not follow its prior well established rulings and practice of viewing the evidence most favorably to the verdict winner in passing upon an opposing motion for judgment n.o.v. The appellant had no reason to believe or anticipate that the State Supreme Court would not adhere to its prior decisions. Instead of predicating its judgment on the evidence most favorable to appellant, that court approved the consideration of other facts not found by the jury, thus applying the Act of 1905, P. L. 286, which was the sole source of its power to enter judgment n.o.v., in a manner beyond the legitimate intent of the Act which resulted in a denial of due process guaranteed to appellant by the Fourteenth Amendment to the Constitution of the United States. The Federal claim thus asserted by appellant was timely. The point is ruled by *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 677, 678, 50 S. Ct. 451, 453, 74 L. Ed. 1107, where this Court said:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court

7. Appendix, p. 13a.

transgressed the due process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity."

Other supporting cases are: *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 320, 50 S. Ct. 326, 327; *Great Northern R. Co. v. Sunburst Oil*, 287 U. S. 358, 366-7, 53 S. Ct. 145, 149; *Saunders v. Shaw*, 244 U. S. 317, 320, 37 S. Ct. 638, 640; see also *Herndon v. Georgia*, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530. See also footnote 8 below.

Appellant specifically referred to the Act of 1905, P. L. 286, in his petition for reargument and pointed out that if the evidence presented an issue of fact for decision by the jury, judgment n.o.v. is improper, and that to disregard the findings of the jury on disputed questions of fact and affirm the judgment n.o.v. in favor of appellee would deprive appellant of his property without due process of law in violation of the Fourteenth Amendment. The validity of the Act was properly drawn in question. In *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67, 49 S. Ct. 61, 63, this Court said:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state

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8. In Stern and Gressman, Supreme Court Practice, third edition, at p. 99, the rule is summarized as follows: "But there are situations where raising the federal question for the first time in the petition for rehearing is timely. Thus if the question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, the petition for rehearing constitutes his first and probably his only chance to present the matter to that court. Accordingly the federal question is timely raised and will support the exercise of Supreme Court jurisdiction. This is true even though the petition for rehearing is summarily denied without reference to the federal question.

court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

In *Fiske v. Kansas*, 274 U. S. 380, 385, 386, 47 S. Ct. 655, 656, 657, this Court said:

"A decision of a State court applying and enforcing a State statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under section 237 of the Judicial Code (Comp. St. § 1214). Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 288, 42 S. Ct. 106, 66 L. Ed. 239. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. Ward & Gow v. Krinsky, 259 U. S. 503, 510, 42 S. Ct. 529, 66 L. Ed. 1033, 28 A. L. R. 1207; Cudahy Co. v. Parramore, 263 U. S. 418, 422, 44 S. Ct. 153, 68 L. Ed. 366, 30 A. L. R. 532. And see St. Louis, etc., R. Co. v. Wynne, 224 U. S. 354, 359, 32 S. Ct. 493, 56 L. Ed. 799, 42 L. R. A. (N. S.) 102.

"And this Court will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. Northern Pacific R. v. North Dakota, 236 U. S. 585, 593, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 45 S. Ct. 129, 69 L. Ed. 342, and cases cited."

The Facts Redecided by the Lower Court Which Resulted in Denial of Due Process to Appellant.

The common pleas court submitted the case to the jury on the theory that the questions of negligence and contributory negligence were for the jury. The court affirmed appellant's points for charge based on clearly apposite cases[9] which establish the well-recognized rule that a business invitee has the right to rely on the invitor's specific instructions to use a particular door to which he is directed as a means of entering and using a lavatory or other facility commonly afforded such persons.

In his opinion the trial judge says (App. 7a)[10]: "To the writer of this opinion and the jury who visited this property these doors and signs were most plain and visible, and as stated by the plaintiff, he knew that barrooms customarily have toilets and signs on them". But the question of whether the doors and signs on the men's room were visible

9. In *Mogren v. Gadonas*, 358 Pa. 507, 58 A. 2d 150 (1948), the wife plaintiff entered a door to a hallway over which there was a sign marked "Ladies". She opened a door inside the hallway which led into a dark room. She advanced about a foot into the room to reach for a light switch when she was precipitated into a cavity in the floor about four feet deep. The Supreme Court of Pennsylvania said (p. 512): "Those entering a dark toilet room to which they are invited cannot be adjudged negligent as a matter of law."

In *James v. Smith*, 93 Pa. Superior Ct., quoted with approval in *Clewell v. Pummer*, 384 Pa. 515, 121 A. 2d 549 (1956), plaintiff was directed to a darkened stairway in a theatre. He thought he saw a platform as he made his first move. It was held that the questions of negligence and contributory negligence were for the jury.

In *Dively v. Penn-Pittsburgh Corp.*, 332 Pa. 65, 2 A. 2d 831, plaintiff fell when she entered a darkened area in an alcove into which she entered by following a sign indicating that she would there find a ladies' room. Recovery was allowed.

Other supporting cases are *Held v. American Hotel Realty Corp.*, 378 Pa. 196, 106 A. 2d 582; *Kallman v. Triangle Hotel Co.*, 357 Pa. 39, 52 A. 2d 900; *Polm v. Hession*, 363 Pa. 494, 70 A. 2d 311; *Stevenson v. Pa. Sports and Enterprises, Inc.*, 372 Pa. 157, 93 A. 2d 236.

10. All subsequent "App. —a" references are to the pagination of the Appendix herein.

or seen by appellant prior to his fall was a disputed question of fact. Appellant testified that he saw no sign and that he did not see any door other than the one he was directed to and entered. What the trial judge saw on the premises or what he might have thought the appellant should have seen is not dispositive of appellant's case as a matter of law. On the contrary, it was for the jury to say what appellant saw or should have seen before he fell. Furthermore, the trial judge could not say what was "plain and visible" to the jury. The jury spoke for itself when it returned its verdict. The purpose of the view was to enable the jury to better understand the evidence. The common pleas court clearly assumed, and in effect redecided, as an established fact, that appellant did or should have seen the sign on the door to the men's room before he fell. This is even contrary to the testimony of one of appellee's own witnesses who stated (R. 261a and 262a) [11] that the men's room signs could not be seen from various points in the barroom. The common pleas treated its substituted finding of fact as determinative of appellant's right to recover as a matter of law, and thus disregarded an entirely opposite finding of fact by the jury. This was not a trial by jury but a trial by the court without a jury.

The common pleas court also found and substituted as an established fact (App. 8a), in disregard of the facts found by the jury, that from the second stool at the bar the toilet signs were visible to appellant. The court then concluded that because of this fact, accepted by the court but not by the jury, the direction given appellant by appellee's bartender is immaterial. There is no evidence in appellant's case that from this or any other point appellant saw or should have seen the sign or door to the men's room. It was completely out of his line of vision as he followed appellee's directions. Appellee's bartender, as he gave the

11. "R. —a" references are to the pagination of the Transcript of the Record.

direction, motioned to his right and to the rear of himself directly toward the door through which the appellant fell.

The common pleas court also says (App. 9a) that "The toilets were plainly visible to anyone who looked, so that it could not be anticipated that a guest would use" the door that appellant entered. Here again the court assumes and asserts a fact which was disputed and decided adversely to appellee by the jury.

The common pleas court repeatedly states in its opinion that the door to the men's room was plainly visible. The true and actual fact, as found by the jury, is that from most of the area in the barroom the door and sign were hidden from view by structural recesses shown on appellant's photographic exhibit No. 4.

The common pleas court holds appellant guilty of contributory negligence as a matter of law, again a conclusion based on redecided facts. It states that "Eckstrom walks to the end of the bar, then into the hallway, with these signs plainly visible from this point" (App. 10a). This is not a correct statement of fact because as appellant started to walk to the door to which he was directed the sign and door to the men's room were never in his view. In fact, as he turned at the end of the bar to enter the door in the hallway his back was turned to the sign and door to the men's room.

The trial judge also states (App. 10a): "He doesn't know where he is walking but he thinks it is into a darkened men's room"; also that if "he had looked before his second step he would have seen". Obviously appellant could not have taken more than one normal step beyond the threshold because the first downward step was only 8½ inches beyond it. The fact as found by the jury was that appellant was misled to believe that the floor inside the door was flush with the outside floor for a distance of 3 or 4 feet. Appellant testified that he first looked down before he stepped inside the door.[12]

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12. The relevant testimony is set forth in appellant's petition for reargument, Appendix, p. 17a.

It is evident that the common pleas court made statements of fact which are not supported by the evidence as a whole, and which for the purpose of this case do not exist because inconsistent with the jury's verdict. Plaintiff's testimony must be taken as true, and the burden of proving contributory negligence was upon the defendant.

The opinion of the State Supreme Court (App. 2a) states that "Eckstrom, enroute to the men's room, opened a door which led to the cellar, an area not lighted by artificial light". But the fact is that appellant was not physically enroute to the men's room. He did not know where the men's room was. From the opinion it would appear as though appellant were moving in the direction of, and intended to go to, the actual men's room when he opened some other door, which is not the fact as found by the jury.

There is ample evidence to support the facts as hereinabove stated (pp. 13, 14 herein) as constituting appellant's cause of action which is clearly supported by the *Mogren*, *Dively*, *Smith*, *Held* and other cases also hereinabove cited at p. 13. The facts relied upon by the common pleas and State Supreme Court as ruling the case against appellant as a matter of law cannot be treated as established or as being incontrovertible. The testimony supporting such assumed facts was disputed and those factual issues were resolved by the jury.

The Question Involved Is Substantial.

The importance and far-reaching effects of the decision in this case is obvious. A litigant in the position of appellant is entitled to the protection of the Due Process Clause of the Fourteenth Amendment where the accepted judicial procedure to try disputed questions of facts in the state court is by a jury trial as at common law. The exclusive power of the jury to find the facts may not be invaded.

This is not a case of resolving conflicts in testimony by deciding the weight of the evidence or passing upon the credibility of the witnesses. It is a case where the facts relied upon by the lower court are without support of any evidence because the jury has rejected them. In *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261, 32 S. Ct. 822, 827, 56 L. Ed. 1074, 1080-81, this Court said:

> ". . . While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

In *Watts v. State of Indiana*, 338 U. S. 49, 51, 69 S. Ct. 1347, 1348, holding inadmissible a confession in a murder case, this Court said:

> ". . . Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits."

In *Milk Wagon Drivers Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293, 61 S. Ct. 552, 555, this Court said:

"Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. . . ."

This Court also said in the *Meadowmoor* case (312 U. S. at 299, 61 S. Ct. at 557) that the states "must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716."

Since trial by jury is the due process to which appellant is here entitled under the Fourteenth Amendment, the language of this Court in *Dimick v. Schiedt*, 293 U. S. 474, 485, 486, 55 S. Ct. 296, 300, 301, is pertinent:

"The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), '* * * the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in the criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

The cogent language of this Court in the FELA cases hereinabove referred to at pages 6 and 7 hereof, in relation to the inviolability of the exclusive function of the jury to find the facts, as preserved by the 7th Amendment, applies with equal force and effect to the posture of the Federal question of Due Process presented here under the 14th Amendment. The characteristic function of the jury to find the facts applies to trial by jury in Pennsylvania the same as it does to trial by jury under the 7th Amendment. The settled and guaranteed course of judicial procedure to determine factual issues in an action at law in Pennsylvania is by trial by jury as at common law.

The decision in the court below is not based on the facts found by the jury, as set forth above at pages 8 and 9 hereof, but the lower court's conclusion is reached by superimposing upon the facts found by the jury other facts having a different legal implication. For example, the lower court held it to be indisputable that appellant saw or should have seen the entrance door to the men's room and the sign on it whereas appellant never testified that he saw such door or sign.[13]

The appellee cannot point to anything in the record which would show that the facts hereinabove stated (pages 8 and 9) as constituting a prima facie case are not without support in the evidence.

The decision in this case goes to the very foundation of our rights and liberties. Reality should not be hidden by

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13. See testimony at App. 14a. Also at p. 65a of the Record appellant testified as follows:

"Q. And when you got to this barroom did you look around?

A. No. I didn't look around much because I followed him and I thought I was a friend of his, understand. I would stay right with him as long as he wanted to.

Q. When you got to the room didn't you look around?

A. I probably took a little look like this, but I didn't pay any attention to anything. I was just in there for company of Specht."

insubstantial findings in violation of the Due Process Clause of the Constitution of the United States. As recently stated by this Court in *School District of Abington Township, Pa. v. Schempp*, 83 S. Ct. 1560, 10 L. Ed. 2d 844, 859, 860: "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"

CONCLUSION.

The effect of the decision in this case is far-reaching. It involves the preservation of Due Process under the 14th Amendment in respect to trial by jury in every state where it is recognized or guaranteed. It is important to protect from erosion the exclusive power of the jury to find the facts. It is respectfully submitted that this case should receive plenary consideration by this Court.

Respectfully submitted,

CHARLES H. WEIDNER,
ARTHUR LITTLETON,
Attorneys for Appellant.

Of Counsel:

STEVENS & LEE,
MORGAN, LEWIS & BOCKIUS.

APPENDIX.

IN THE

Supreme Court of Pennsylvania.

EASTERN DISTRICT.

ALGOT V. ECKSTROM, *Appellant*, *v.* READING POLICE HOME ASSOCIATION OF READING, PA.	No. 28, January Term, 1963. Appeal from Judgment of the Court of Common Pleas of Berks County, No. 32, March Term, 1962. Entered March 13, 1962.

OPINION.

PER CURIAM.

Filed: March 19, 1963.

This is an appeal from the entry of judgment n.o.v. in a trespass action by the Court of Common Pleas of Berks County.

Algot Eckstrom, 62 years of age and a visitor in Berks County, was invited on July 9, 1957 by a member of the Reading Police Home Association [Association] to the latter's club house located in Exeter Township, Berks County. Eckstrom and his companion arrived at the club house late in the afternoon, had some drinks at the bar, played on a bowling game machine and, after about three-quarters of an hour in the barroom, Eckstrom asked one of the bar-

tenders directions to the men's rest room and the bartender said "over there" and pointed to his [bartender's] right. To the right front of the bar were two doorways clearly marked "Mens" and "Ladies", with signs thereon and a man's head on one door and a lady's head on the other.

Eckstrom, enroute to the men's room, opened a door which led to the cellar, an area not lighted by artificial light. He testified he could see the floor was level, he stepped through the doorway with his right foot, took another step *in the dark* and fell, sustaining severe injuries.

Alleging negligence on the Association's part, Eckstrom instituted a trespass action against the Association in the Court of Common Pleas of Berks County. The matter came on for trial before Judge Ralph Body [then a member of the Court of Common Pleas of Berks County] and a jury. The jury returned a verdict in favor of Eckstrom and against the Association in the amount of $20,605.50. The Association moved for judgment n.o.v. which the court below granted on two grounds: (a) Eckstrom had failed to establish any negligence on the part of the Association and (b) Eckstrom was guilty of contributory negligence as a matter of law.

After a review of the record and an examination of the testimony in the light most favorable to Eckstrom, we find ourselves in full agreement with the conclusion reached by the court below: "On the question of negligence of the [Association] it is our opinion that no negligence on the part of the [Association] has been proved, and the Court should have granted the involuntary non suit. We find [Eckstrom] guilty of contributory negligence as a matter of law for it was his own actions, his failure to take the necessary precautions for his own safety, that brought about the injury of which he complains. What he did and failed to do constitutes contributory negligence in our opinion."

Judgment affirmed.

Mr. Justice Musmanno and Mr. Justice Eagen dissent.

ALGOT V. ECKSTROM, *Plaintiff,* v. READING POLICE HOME ASSOCIATION OF READING, PA., a Corporation, *Defendant.*	In the Court of Common Pleas of Berks County, Pennsylvania. No. 82, August Term, 1959. Sur Motion for Judgment N. O. V. and New Trial.

OPINION, BODY, J., MARCH 13, 1962.

The plaintiff brought an action in trespass against the defendant to recover damages for personal injuries sustained when he entered and fell down a cellarway in the defendant's club home on July 9, 1957. The case was tried before this Court and a jury found a verdict for the plaintiff in the sum of $20,605.50.

The defendant, through its counsel, duly filed it motion for judgment n.o.v. and for a new trial.

The defendant, the Reading Police Association of Reading, Pa., maintains a spacious club property (Exhibit #14) in Exeter Township, Berks County, Pennsylvania, for its members and their guests. The jury, by agreement of counsel and consent of the Court, made an inspection of the premises before any testimony was taken. This was most helpful in understanding the testimony of the various witnesses.

The plaintiff, age sixty-two, with his wife was visiting their son and family in Berks County during his vacation. A neighbor, member of the defendant association, invited the plaintiff to go with him on July 9, 1957 to the defendant's club house. Arriving there about 4:45 P. M. they purchased some drinks at the bar and also played on a bowling game machine with some other guests. To enter the barroom from the outside the plaintiff passed through a hallway area a distance of fourteen (14) feet seven (7)

inches, to the left of which is a kitchen, and to the right of which is a paneled area of white pine with a recessed door a short distance from an archway at the bar and dining area. Near this archway is a recessed doorway (Exhibit #5) with a white pine door which was not labeled or marked and which was unlocked.

To the left of the archway and about perpendicular to the hallway is the sixteen (16) foot bar running to the end of the barroom. To the left front of the bar was the bowling machine and to the right front at a slight angle were two doorways marked "Mens" and "Ladies" with signs six and three-quarter (6¾) inches by four (4) inches. In addition, there is a man's head on the one door and a lady's head on the other. These signs could be seen from the archway entrance and from the end of the bar, but not from the third or fourth stool from the end of the bar. The barroom and dining area with a total length of forty-three (43) feet ten (10) inches by about sixteen (16) feet in width were lighted by numerous windows as well as electric lights.

After spending about three-quarters of an hour in the barroom the plaintiff asked one of the defendant's bartenders for the men's rest room, who said it was "over there" and pointed to his (bartender's) right. Plaintiff then walked along the bar to the archway, then through the hallway (the same hallway area through which he had entered), and opened a door to the cellar which was not lighted by artificial light, but plaintiff could see the floor was level. He took one step in with his right foot, then took another step, and then he fell. He was looking down but he did not see any stairway, and could not see where he was going for it was too dark. He thought it was the rest room, and also that he would find a light switch by feeling around.

The plaintiff with his host had stopped at a bar called Ramseys where they had a drink enroute to the defendant's club house. He thought that he had been to the defendant

club house on a previous visit, a year before this. He also admitted that it was customary for clubs to have toilets with signs on the doors.

Should the Court enter Judgment N. O. V.?

In passing upon the defendant's motion for judgment n.o.v. the evidence in this case must be considered in the light most favorable to the plaintiff for plaintiff was the verdict winner. Ason v. Leonhart, 402 Pa. 312.

The facts above set forth are taken from the plaintiff's case and mostly from the testimony of plaintiff Eckstrom. We have not considered the testimony of the defendant's witnesses in arriving at our conclusions.

The plaintiff contends in his brief and at oral argument that the defendant is guilty of negligence in that it breached its duty to a business visitor by not keeping its premises reasonably safe for business visitors, and that defendant's bartender did not properly direct the plaintiff to the door of the men's room. Further, that the plaintiff is not guilty of contributory negligence when he went into and through an unmarked, unlocked door, took two steps in the dark, and fell down the stairway. He contends that the negligence of the defendant and the contributory negligence of the plaintiff were jury questions, and that the verdict of the jury should not be disturbed.

Restatement of Torts, Volume II, Section 343, lays down this ruling:

> "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
>
> (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and;
>
> (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to give a warning adequate to enable them to avoid harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility."

Comment "b" reads as follows:

"b. When business visitor on part of premises not held open for business purposes. Under the rule stated in this Section, a possessor land is subject to liability to another as a business visitor only for such bodily harm as he sustains while upon a part of the land upon which the possessor gives the other reason to believe this his presence is permitted or desired because of its connection with the business or affairs of the possessor and which as such is held open to the other as a business visitor. . . ."

The case of Druding v. Philadelphia, 374 Pa. 202, holds:

"No person is required to take extraordinary precautions to save adults in apparent possession of their reasoning faculties from the consequences of their own inattentiveness and carelessness . . . 'Everyone has a right to proceed upon the assumption that those to whom he owes a duty of care are normal in every respect and prepared on their part to exercise the care of prudent persons generally.'" Jefferson v. Y. M. C. A., 354 Pa. 563, 47 A. 2d 653.

In the plaintiff's complaint in paragraph 7 the following allegations of negligence are set forth:

"(a) Failed to provide and afford any artificial or adequate light in the areaway inside said door where plaintiff fell.

(b) It permitted said areaway to be dimly visible to guests and business invitees, such as the plaintiff, thereby giving said areaway directly inside of said door, a deceptive appearance of safety, whereas the steps leading downward to the cellar where the plaintiff fell, began directly inside said door.

(c) Had failed to post or give plaintiff and other business invitees any notice or warning not to enter said door or areaway, or to indicate that the same was not for use by guests or business invitees.

(d) It negligently directed plaintiff to said door as the entrance to the men's room.

(e) It otherwise failed to exercise reasonable care for the safety of business invitees upon its premises."

The visit to the premises and the testimony clearly sets forth the condition of the defendant's premises. The barroom and dining area were small, and if one was looking for a toilet then there were the two doors plainly marked "Mens" and "Ladies", lighted electrically, and with a man's head and a woman's head painted on the respective doors in addition. To the writer of this opinion and the jury who visited this property these doors and signs were most plain and visible, and as stated by the plaintiff, he knew that barrooms customarily have toilets with signs on them. The defendant certainly did all a prudent person would do as to marking of toilets. Must the owner of a club have the various directional signs about a room only forty-three (43) feet in length, and from the edge of the bar to the wall nine and one-half (9½) feet, to indicate the location of a toilet? It is our opinion that it did exercise the care of a prudent person in this regard. To carry out the contention of the plaintiff the defendant would have to have signs on all of its doors like "upstairs", "store room", "liquor closet", "private office—do not enter", and the like, in order to carry out all necessary precautions

lest something might happen to someone. This is not nor should it be the law.

To carry this contention to its logical extreme, if the plaintiff had walked into the kitchen door, for that was along the corridor too, and that door was not marked, and if plaintiff had walked in and stumbled over a bag of potatoes, plaintiff would contend that defendant, anticipating that someone would walk in, owed a duty of reasonable care of not leaving potatoes in the kitchen, and that liability would follow.

In addition, we have the physical fact that the "Mens" and "Ladies" were side by side, so considering the width of a doorway and the four signs we think the toilet room facilities were amply and reasonably marked. Four signs and double doors should certainly be seen if one would choose to look.

We see no negligence in the fact that the bartender in response to the plaintiff's question said it was "over there" and pointed to his right, for we have the testimony of plaintiff's witness that from the second stool at the bar the toilet signs were plainly visible. Certainly toilet signs must not be visible from all points and sections of a bar and barroom. The bartender certainly had no duty to keep his eyes on this guest to see to it that he went to the toilet door, nor could he foresee that Eckstrom would get into the cellarway.

As to the unlocked, unmarked door in the entrance hallway to the cellar, plaintiff contends the defendant was negligent. In like manner we find no negligence. When the plaintiff entered this place of business as a guest he had to walk in this hallway, with the kitchen on his left and the doorway to the cellar on his right, and the barroom in front of him, some sixteen (16) feet from the main door. Who would suspect, predict or anticipate that a guest would go into the kitchen or into the unmarked door, take two steps, and fall down into the cellar? We think that it was the duty of the defendant to keep its premises in a reasonably

safe condition, so that guests who used the premises could do so without unreasonable risk or harm. The toilets were plainly visible to anyone who looked, so it could not be anticipated that a guest would use this unmarked door, walk in, fail to put on a light, and plunge down the stairs.

This stairway, according to the plaintiff, was a darkened area. Certainly defendant could not anticipate, and owed no duty to have a light lit in this cellarway.

On the question of negligence of the defendant it is our opinion that no negligence on the part of the defendant has been proved, and the Court should have granted the involuntary non suit.

We find the plaintiff guilty of contributory negligence as a matter of law for it was his own actions, his failure to take the necessary precautions for his own safety, that brought about the injury of which he complains. What he did and failed to do constitutes contributory negligence in our opinion.

This was his second visit to the plaintiff's premises as a guest of a member, when he came into the barroom, and had he looked he would have seen the two doorways plainly marked "Mens" and "Ladies". Then about three-quarters of an hour later he asked directions to the men's room, and he is told "over there" which was to the bartender's right and to the plaintiff's left. The plaintiff then walks along the bar and turns down the hallway toward the outside, which was in back of the bartender rather than to the bartender's right. The bartender was facing Eckstrom when this conversation took place. The plaintiff walks down the hallway, takes hold of the knob on the left of the door, opens the door away from him and to his right side. It is dark. The door is recessed from the main hallway as shown on Exhibit No. 8. He took one step in with his right foot into the darkened areaway with the door open, but he could see his right foot on the floor. Then he takes the second and final step with his left foot, which goes beyond the eight and one-half (8½) inches to the top step. Therefore, the

most distance that the plaintiff could see was eight and one-half (8½) inches on his own testimony. It is dark, but he chances a second step not knowing where it will land. It was beyond the riser. He falls and is injured.

On these facts the plaintiff says that he is not guilty of contributory negligence as a matter of law.

On his own knowledge he knew that in places of this kind there are toilets and signs marking them. This door had no sign on it of any kind. He saw, or should have seen, the signs in the barroom if he had looked. The average reasonable person takes a look around for such signs and then proceeds. However, Eckstrom walks to the end of the bar, then into the hallway, with these signs plainly visible from this point. He goes to this pine door in a manner that must be classed as inattentive and careless in view of what physical actions follow. He opens the door, takes a step forward with his right foot into the recessed doorway, and then takes a second step forward. He doesn't know where he is walking but he thinks it is into a darkened men's room. How could he or any reasonable man think all doors in a barroom and entrance to a barroom lead to a toilet? He did not use his senses, nor did he try to protect himself in those eight and one-half (8½) inches. If he had looked before his second step he would have seen. He did not choose to do so. Sloss v. Greenberger, 396 Pa. 356, says:

> "'What this court stated in Bailey v. Alexander Realty Co., 342 Pa. 362, 20 A. 2d 754, applies to the instant case: ". . . When an individual can assure his own safety by the use of his senses, he must do so or abide the consequences of his carelessness. . . . The duty of availing oneself of one's senses, for self-protection can seldom be breached with physical impunity and never with legal sanction. . . . The rule that a victim cannot recover damages for injuries sustained by him if he could have avoided the injury by the exercise of ordinary care bars this plaintiff's recovery:" ' " Bartek v. Grossman, 356 Pa. 522, 52 A. 2d 209.

Further, as the Court said in Druding v. Philadelphia, 374 Pa. 202, at page 204:

"Plaintiff was an invitee at the swimming pool and the City owed him the duty of reasonable care. However, as Mr. Justice Jones said in McCreery v. Westmoreland Farm Bureau, 357 Pa. 567, 570, 55 A. 2d 399: 'There is no duty, however, upon the possessor of land to warn or guard a business invitee against a danger that is obvious.'" . . .

"One who heedlessly walks into a place which he knows or should know may be dangerous takes the chance of the result and must abide by the consequences: Jones v. Counties Gas & Elec. Co., 289 Pa. 128; McCann v. Philadelphia Fairfax Corporation, 344 Pa. 636, 640, 26 A. 2d 540. See to the same effect: Miller v. Exeter Borough, 366 Pa. 336, 340, 77 A. 2d 395." . . .

"'A person may not recover for injuries which are received as a result of a failure on his part to observe and avoid an obvious condition which ordinary care for his own safety would have disclosed.' Boock v. Acme Markets, Inc., 347 Pa. 501, 503, 32 A. 2d 759; Roger v. Max AZen, Inc., 340 Pa. 328, 16 A. 2d 529."

To quote the plaintiff he says (N. T. p. 43):

"Q. Were you looking up or down when you opened the door and stepped in?

A. First, of course, I looked down.

Q. And you could see that you were going into a stairway, couldn't you?

A. No, sir, I couldn't see any stairway.

Q. You couldn't?

A. No.

Q. Was it so dark you couldn't see where you were going?

A. It was no artificial light there at all.

Q. But it was a bright, sunny day, the windows were open, the door was open in this club, wasn't it? Isn't that right?

A. I think the doors were probably open. (N. T. p. 44)

Q. Then do I understand that when you took the second step you couldn't see where you were going?

A. No, I couldn't see right up there, it was too dark.

Q. And then you fell?

A. That is right."

The conclusion from the above is that the plaintiff Eckstrom did not use ordinary care for if he had, considering all the circumstances, he would have seen where he was stepping with his left foot, and he could have avoided taking the second step into the darkness and into a hidden danger. Bartek v. Grossman, 356 Pa. 522.

Both plaintiff's counsel and defendant's counsel cite numerous cases in their very excellent briefs, but there would be no point in discussing them in this opinion. In the Court's opinion the facts of each case must determine the conclusion in the particular case. All that we can do is to examine and carefully weigh the testimony in this case. This the Court has done.

It is our opinion, therefore, that Eckstrom was guilty of contributory negligence. To hold to the contrary would put a premium on carelessness, and the duty of care for oneself would be removed. It would take away the duty to look and be cautious. It would take away the duty of exercising ordinary care.

And Now, March 13, 1962, for the foregoing reasons judgment n.o.v. is entered for the defendant, Reading Police Association of Reading, Pa.

By THE COURT:

RALPH C. BODY, *J.*

PETITION FOR REARGUMENT IN THE SUPREME COURT OF PENNSYLVANIA.

I. Prayer.

Plaintiff respectfully prays this Honorable Court to order a reargument of the above-captioned appeal for the reasons hereinbelow set forth.

II. Short Summary of the Case.

Plaintiff, a guest at the defendant association's club-rooms, asked defendant's bartender for directions to the men's room. The bartender motioned in the direction of a closed, unmarked, unlocked door, actually in the opposite direction from the men's room and in the main hall. Plaintiff opened the door so indicated, saw what he thought was a floor on the same level as the floor on which he was standing, reached for the light switch and fell down a flight of unguarded stairs to his serious injury.

The jury, under proper instructions, returned a verdict for plaintiff. The trial judge entered a judgment n.o.v. for defendant. Plaintiff appealed but this Court affirmed the judgment n.o.v.

Plaintiff herewith respectfully prays reargument for the following reasons.

III. The Points Misapprehended or Overlooked.

The opinion of this Honorable Court clearly indicates that there has been a serious misapprehension of the crucial and pivotal facts as follows:

1. *The Plaintiff's Evidence of Defendant's Negligence.*

The following evidence of defendant's negligence and all inferences from it in plaintiff's favor are to be taken as true:[1]

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1. *Kolos v. Monongahela C. R. R. Co.*, 405 Pa. 479, 483 (1961); *Szawlinsky v. Campbell*, 402 Pa. 651, 652 (1961); *Ason v. Leonhart*, 402 Pa. 312, 315 (1960); *Clawenger v. Zabraskey*, 399 Pa. 380, 381 (1960).

(a) As plaintiff asked the bartender directions to the men's room, the plaintiff and the bartender stood face to face on opposite sides of the bar (N. T. 50a, 51a). At that time, the men's room was to the right of the bartender and in front of him while the door through which the plaintiff fell was also to the right of the bartender but behind him (N. T. 44a, R. Exhibit No. 4).

(b) The plaintiff testified:

Q. Was the bartender facing you when he answered you?

A. Yes.

Q. And made this motion?

A. Yes.

Q. And what did he say and do as he faced you, what did he say and do?

A. I asked him, "Will you please tell me where the men's rest room is?" And he said, "Over there", like that.

Q. Indicating that he turned his head to his right and to the rear of himself?

A. That is right.

Q. And after he said that what did you do?

A. I looked that way, I couldn't see any sign, I couldn't see any door, the only thing I could see was one in the hallway. That was the only door I could see, so I thought that must be it. I looked there, there was no sign on the door, so I walked up and I thought this is it. (N. T. 51a, 52a)

(c) The door so indicated was unmarked (N. T. 52a), unlocked (N. T. 52a, 55a), unlighted (N. T. 52a, 53a) and was in the main hallway (N. T. 52a).

(d) It was a door anyone in the main hallway could and might have opened for any reason but was in fact a trap, leading directly to unlighted stairs going down.

(c) The opinion of this Honorable Court states that:

> ". . . Eckstrom asked one of the bartenders directions to the men's rest room and the bartender said 'over there' and pointed to his (bartender's) right. To the right front of the bar were two doorways clearly marked 'Mens' and 'Ladies', with signs thereon and a man's head on one door and a lady's head on the other". (Opin. p. 1)

But the actual facts are that (1) when Eckstrom asked the bartender for directions to the men's rest room, the bartender said "over there" and turned his head to his right and to the rear of himself which direction was directly toward the door through which Eckstrom subsequently fell (N. T. 52a) and (2) the men's and ladies' rest rooms were not visible to Eckstrom from the position in which he was standing when he asked directions thereto (N. T. 245a, 261a), said rest rooms in fact being on the opposite side of the room from the direction indicated by the bartender in answering Eckstrom's question (R. Exhibit No. 4, N. T. 44a).

2. Plaintiff's Evidence of His Own Due Care.

The following evidence of plaintiff's due care and all inferences from it in favor of plaintiff are to be taken as true:[2]

(a) A. (Plaintiff) I thought it was the men's rest room inside. I got hold of the doorknob, and I opened the door, and it was no artificial light inside, and it looked to me like the floor inside was level like the one I was standing on. (N. T. 51a, 52a)

(b) A. (Plaintiff) It looked to me like it was a floor level with the one I was standing on, and I

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2. *Kolos v. Monongahela C. R. R. Co.*, 405 Pa. 479, 483 (1961); *Szawlinsky v. Campbell*, 402 Pa. 651, 652 (1961); *Ason v. Leonhart*, 402 Pa. 312, 315 (1960); *Cleavenger v. Zabraskey*, 399 Pa. 380, 381 (1960); *Virden v. Hosler*, 387 Pa. 1, 5 (1956).

thought I go in there and I find a switch, turn on the switch. (N. T. 52a)

(c) Q. When you opened the door didn't you have hold of the knob?
A. (Plaintiff) Yes. (N. T. 53a)

(d) (Plaintiff) The floor inside the door looked level like the one I was standing on. (N. T. 54a)

(e) Q. Had you ever been there before?
A. (Plaintiff) Not unless I was there one year before. I am not sure if it was the same place. (N. T. 63a)

(f) Q. And then you opened the door and then you took one step, did you?
A. (Plaintiff) Yes.
Q. And which foot did you start out with?
A. I put my right foot ahead of me a little bit there.
Q. The right foot you started out with?
A. Yes.
Q. After you opened the door?
A. Yes.
Q. And it hit the floor, didn't it?
A. Yes.
Q. And then you took another step with your left foot?
A. Yes.
Q. And then you fell?
A. That is right.
Q. And when you opened the door you could see where you were going to put your right foot down, couldn't you?
A. Yes, the impression I got was it was a rest room, and the floor looked level to me in there, and I stepped in. I thought I would find a switch when I came in. (N. T. 75a, 76a)

(g) Q. Then do I understand that when you took the second step you couldn't see where you were going, is that it?

MR. WEIDNER: He didn't say that. He said it looked as though it were level.

THE COURT: That is right. You may ask the question whether he could or could not.

MR. EVES: Repeat the question.

THE STENOGRAPHER: Question: Then do I (Defendant's counsel) understand that when you took the second step you couldn't see where you were going, is that it?

PLAINTIFF: I thought it was level floor. (N. T. 77a)

(h) Q. How far could you see in that the floor looked level, as you said before, when you first opened the door, how far could you see in or how far did it appear to you that the floor looked level?

A. (Plaintiff) I would say three or four feet. (N. T. 105a)

(i) Q. And that light would get partly in the hallway, would it not?

A. (Defendant's witness Hoffman) In other words, you would open the cellar door which this man entered, and light coming through there would throw the light, there would be enough light to see the switch you would have to go put on to go to the cellar.

Q. Some light would show in there, though?

A. That is correct. (N. T. 216a, 217a)

(j) Q. Now you say that there are certain places or spots in the barroom where you could not see any signs of the men's room or ladies' room, is that correct?

A. (Defendant's witness Steiner) Just according to where you were, sir.

Q. And if you are up in the vicinity here of the third, fourth or fifth stool you cannot see the signs behind that extension there, can you?
A. No, sir. (N. T. 261a, 262a)

(k) Q. There was no other mark on this cellarway door where Mr. Eckstrom fell, it was just plain at the time he fell, no other sign of any kind?
A. Defendant's witness (Steiner) No, sir.

(l) Q. It was just a plain panel, isn't that right?
A. That is right, sir.
Q. And there was no sign in the barroom indicating the direction toward the men's room, was there?
A. No, sir. (N. T. 264a, 265a)

(m) The opinion of your Honorable Court states that "Eckstrom, enroute to the men's room, opened a door which led to the cellar, an area not lighted by artificial light", whereas the facts are that Eckstrom was not enroute to the men's room but was in the act of following the incorrect and misleading directions of the bartender toward the very door through which he, Eckstrom, subsequently fell, which door was located in the opposite direction from the location of the rest rooms.

(n) The opinion states that:

> "He testified he could see the floor was level, he stepped through the doorway with his right foot, took another step *in the dark* and fell, sustaining severe injuries." (Emphasis by Court.) (Opin. p. 2)

But the actual facts are not that Eckstrom stepped through the doorway in the dark but that he took a step inside the doorway and onto what in the dim lighting appeared to him to be a level floor (N. T. 51a, 52a, 54a, 77a, 105a) and that the darkness, as testified to by Eckstrom, referred to the condition at Eckstrom's eye level and not at floor level

where there was some illumination from the lights on the premises (N. T. 53a, 77a).

(o) Plaintiff's brief cited a substantial number of cases, including for example, *Direly v. Penn-Pittsburgh Corp.*, 332 Pa. 65 (Plaintiff's Brief, pp. 11, 12, 13, 22, 30); *Mogren v. Gadonas*, 358 Pa. 507 (Plaintiff's Brief, pp. 19, 22, 30, 31, 34), and *Held v. American Hotel Realty Corp.*, 378 Pa. 196 (Plaintiff's Brief, p. 15), in all of which, on facts less persuasive of due care by plaintiff than in the instant case, and absent any misdirection by defendant, this Court held that the question of plaintiff's degree of care was for the jury.

3. *Reasonable Men Have Differed as to This Evidence by 6 to 14.*

Since the statute[3] authorizing the granting of the judgment n.o.v. was not intended to authorize the Court to invade the province of the jury, it is very well established that if the evidence on a material point presented an issue of fact for decision by the jury, judgment n.o.v. is improper.[4] It follows that if there is a conflict of testimony upon a material point, such a situation not only does not furnish a ground for judgment n.o.v.[5] but the Court is precluded by such conflict from entering such a judgment.[6] Obviously if there is reasonable support in the evidence for the verdict which was rendered, and if the verdict is otherwise lawful, a motion for a judgment n.o.v. will not be granted.[7]

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3. The Act of April 22, 1905, P. L. 286 as amended (12 P. S. § 681).

4. *Dempsey v. First National Bank of Scranton*, 353 Pa. 470 (1946); *Porter v. Commonwealth Casualty Co.*, 270 Pa. 508 (1921); *Naugle v. Reading Co.*, 145 Pa. Super. 341 (1941).

5. *Strong v. Jarka Corp. of Phila.*, 317 Pa. 317 (1935); *Willets v. Butler Township*, 141 Pa. Super. 394 (1940).

6. *Hostetler v. Kniseley*, 322 Pa. 248 (1936).

7. *Clearfield v. Driver Salesmen's Union, Local No. 463*, 160 Pa. Super. 54 (1946); *Ondo v. Greek Catholic Union of Russian Brotherhoods*, 155 Pa. Super. 492 (1944).

If, therefore, reasonable men could differ at to whether the evidence quoted above, if believed, was negligence upon the part of the defendant or its employee and that the plaintiff himself acted as any reasonably prudent man would have acted in like circumstances then it was an error to enter a judgment n.o.v.[8]

To direct a man under the circumstances of this case in a direction opposite to that of the men's room and instead in the direction of an unmarked, unlocked, unlighted door in a main hallway behind which a downward flight of steps was concealed like a trap, is indeed evidence of negligence and was so regarded by twelve jurors under proper instructions as to the law, and by two members of this learned Court. Thus reasonable men could—and actually did—differ as to whether this evidence was evidence of defendant's lack of due care.

Further, to follow the directions of an employee to an unlocked and unmarked door in a main hallway and to open that door, look in, see two or three feet of floor and step in to turn on the light switch, shows due care—and was so regarded as showing due care by twelve jurors properly instructed in the law, and by two members of this learned Court.

Thus reasonable men could—and actually did—differ as to whether plaintiff himself had exercised due care under the circumstances.

Under these circumstances, plaintiff respectfully submits there is no basis for the entry of a judgment n.o.v.

4. *An Affirmance of Judgment n.o.v. Upon Such a Record Is a Violation of Due Process.*

Where a record shows such evidence of negligence upon the part of the defendant and such evidence of care upon the part of plaintiff that reasonable men can differ as to

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8. *Kolos v. Monongahela C. R. R. Co.*, 405 Pa. 479, 485 (1961); *O'Connor v. Phila. Suburban Transp. Co.*, 362 Pa. 404, 407 (1949); *Eibell v. Smith*, 357 Pa. 490 (1947).

whether or not the plaintiff is entitled to recover and a jury properly instructed in the law returns a verdict in favor of the plaintiff, to disregard the finding of the jury and to affirm a judgment entered n.o.v. in favor of the defendant is, plaintiff respectfully submits, to deprive the plaintiff of his property without due process of law and substantially to depart from the accepted and usual course of judicial proceedings.

IV. Conclusion.

It is evident that the trial Court and the learned majority of this Honorable Court overlooked ample evidence of the defendant's negligence and of due care on the part of the plaintiff.

In addition, it is equally evident that the trial Court and the learned majority of this Honorable Court misapprehended the law and allowed the entry of a judgment n.o.v. under circumstances in which reasonable and sensible men could, and in fact did, differ as to the plaintiff's exercise of due care.

For these reasons, plaintiff appellant respectfully submits that reargument should be allowed and judgment entered for plaintiff appellant on his verdict.

Respectfully submitted,

Charles H. Weidner,
Arthur Littleton,
Attorneys for Appellant.

Of Counsel.:

Stevens & Lee,
18 South Fifth Street,
Reading, Pennsylvania.

Morgan, Lewis & Bockius,
2107 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

Charles H. Weidner, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition for reargument are true and correct to the best of his knowledge, information and belief.

CHARLES H. WEIDNER.

Sworn to and subscribed before me this 28th day of March, 1963.

ALMA MEYER,
Notary Public, Philadelphia, Phila. Co., Pa.
My Commission Expires March 19, 1965.

(SEAL)

FINAL JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA.

March 19, 1963. Judgment affirmed.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING APPELLANT'S PETITION FOR REARGUMENT.

April 18, 1963. Petition Denied. Per Curiam.